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No. 02-710

In the Supreme Court of the United States

CASA DE CAMBIO COMDIV S.A. DE C.V.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DAVID M. COHEN
ANTHONY J. STEINMEYER
MARK A. MELNICK
CHRISTINE N. KOHL
DORIS S. FINNERMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

30 pp

QUESTIONS PRESENTED

A Department of the Treasury regulation provides that "[t]he Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks," and that the Treasury has "a reasonable time" in which to make such examination. 31 C.F.R. 240.3(c). The questions presented are:

1. Whether a claim for money damages may be brought against the United States for its alleged failure to examine a check and to refuse payment within "a reasonable time," where the plaintiff is not the bank that presented the check to the Treasury for payment, but rather the depositor of the check, which the Treasury discovered to have been stolen and altered.

2. Whether petitioner waived its argument that it may assert any claims that the presenting bank might have against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 291 F.3d 1356. The opinion of the Court of Federal Claims (Pet. App. 24-48) is reported at 48 Fed. Cl. 137.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2002. A petition for rehearing was denied on August 7, 2002 (Pet. App. 49). The petition for a writ of certiorari was filed on November 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has directed the Secretary of the Treasury to prescribe regulations governing the payment of checks drawn on the United States Treasury. 31 U.S.C. 3328(e)(1)(B) and (C). "Nothing" in the statute, however, "limits the authority of the Secretary to decline payment of a Treasury check after first examination thereof at the Treasury." 31 U.S.C. 3328(f).

Pursuant to that statutory authority, the Department of the Treasury (Treasury) has promulgated regulations that "prescribe the requirements for indorsement and the conditions for payment of checks drawn on the United States Treasury." 31 C.F.R. 240.1. See generally 31 C.F.R. Pt. 240. Section 240.3 of those regulations imposes several "[l]imitations on payment," including the following:

> (c) The Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks. The Treasury shall have a reasonable time to make such examination.
>
> (d) Checks shall be deemed to be paid by the United States Treasury only after first examination has been fully completed.

31 C.F.R. 240.3(c) and (d). The Treasury regulations also establish requirements for the "[p]rocessing of checks." 31 C.F.R. 240.9 (2001). Each Federal Reserve Bank (FRB), as a depository of public funds, is required to receive checks from member and nonmember banks and other depositors "when indorsed by such banks or depositors who guarantee all prior indorsements thereon." 31 C.F.R. 240.9(a)(3)(i) (2001). The FRBs must "[g]ive immediate credit" for such checks "in ac-

cordance with their current Time Schedules and charge the amount of the checks cashed or otherwise received to the account of the Treasury, *subject to examination and payment by the United States Treasury.*" 31 C.F.R. 240.9(a)(3)(ii) (2001) (emphasis added). If, upon the first examination authorized by Section 240.3(c), Treasury refuses payment of any check, the FRBs are required to "give immediate credit therefor in the United States Treasury's account, thereby reversing the previous charge to the account for such check." 31 C.F.R. 240.9(a)(3)(iv) (2001).

The Treasury regulations also provide for the "[r]eclamation of amounts of paid checks." 31 C.F.R. 240.6. That alternative process provides a mechanism for Treasury to reclaim funds *after* first examination has been fully completed and a check is deemed to have "be[en] paid" under Section 240.3(d). *Ibid.* If Treasury invokes that process, which it may use to reclaim funds that should not have been paid due to "a forged or unauthorized indorsement" or "any other material defect or alteration which was not discovered upon first examination," 31 C.F.R. 240.6(a)(1) and (2), Treasury sends "the presenting bank or any other indorser" a "Request for Refund (Reclamation)," which the bank may protest, 31 C.F.R. 240.7(a) and (c).

2. Petitioner Casa de Cambio Comdiv S.A. de C.V. was an international currency exchange, incorporated in Mexico, with its principal place of business in Mexico City. On October 29, 1993, Genaro Alvarez (Alvarez) presented to petitioner a check for $1,165,000 drawn on the United States Treasury and payable to Alvarez. Petitioner paid that amount to Alvarez and forwarded the check to its banker, Norwest Bank Minnesota, N.A. (Norwest), for deposit and collection. Norwest forwarded the check to the FRB of Minneapolis on No-

vember 1, 1993, and, three days later, the FRB debited the Treasury account and gave immediate credit for the check to Norwest. Pet. App. 3; Pet. 9; see 31 C.F.R. 240.9(a)(3)(ii) (2001). On November 5, petitioner verified that the funds were available in its Norwest account. Pet. 9.

On November 17, 1993, however, Treasury learned that checks had been stolen from the United States Postal Service Data Center in St. Louis, including a check with the same serial number as the check made payable to and cashed by Alvarez. Evidently, the check had no payee at the time it was stolen, and it was subsequently made payable to Alvarez, who endorsed it. On February 1, 1994, pursuant to 31 C.F.R. 240.3(c), Treasury directed the FRB to credit Treasury's account for the full amount of the check (see 31 C.F.R. 240.9(a)(3)(iv) (2001)). The FRB did so the same day and debited Norwest's account in a corresponding amount. Norwest subsequently debited petitioner's account. Pet. App. 3-4.

3. Almost six years later, petitioner filed suit against the United States in the Court of Federal Claims, seeking to recover the amount of the check and additional money damages. Petitioner asserted three theories of liability. Count I alleged that the government did not decline payment on the check within "a reasonable time," in violation of 31 C.F.R. 240.3(c) and (d). Count II alleged an illegal exaction without due process, and Count III alleged a taking of petitioner's property without just compensation, in violation of the Fifth Amendment. Pet. App. 4.

The Court of Federal Claims granted the government's motion to dismiss. Pet. App. 24-48. The court dismissed Count I for lack of jurisdiction because the court concluded that the Treasury regulations are "di-

rected only at protecting the Treasury's rights, rather than those of third parties." *Id.* at 30. The court reasoned that, even if Treasury had violated 31 C.F.R. 240.3(c), that provision does not provide a depositor, such as petitioner, a cause of action for the recovery of damages within the court's jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1). Pet. App. 30. The court dismissed petitioner's takings claim because "[i]t was Norwest and not the United States that took the action that resulted in the diminishment of the [petitioner's] funds[,] and the involvement of the United States in that transaction was not 'sufficiently direct and substantial' to make the United States liable for a taking of those funds." *Id.* at 34-35 (quoting *National Bd. of YMCA* v. *United States*, 395 U.S. 85, 93 (1969) (see Pet. App. 31)). Similarly, the court dismissed petitioner's illegal exaction claim, because the funds at issue were recouped from petitioner by Norwest pursuant to its deposit contract with petitioner, rather than as a direct result of a statute or regulation, or at the government's behest. See *id.* at 39-42.

4. The court of appeals affirmed the district court's judgment. Pet. App. 1-23. Relying on *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), the court concluded that a presenting bank (here, Norwest) might have legal recourse against the United States, but a depositor, such as petitioner, has no claim against Treasury in the circumstances here. Pet. App. 6-8. Although the court agreed with petitioner that a claim may lie against the United States when a statute or regulation is "money-mandating" as to the plaintiff, *id.* at 8, the court rejected petitioner's arguments that the Treasury regulations are money-mandating as to petitioner. *Id.* at 9-11. The court ruled that, even if one accepted petitioner's contention that Treasury's reclamation regula-

tions (see 31 C.F.R. 240.6, 240.7) should have been applied in this case, those regulations "would only apply to claims against the government by Norwest," the presenting bank from which Treasury requested return of the funds. Pet. App. 11. The court held that the regulations "are not money-mandating as to [petitioner], since there is no indication that they were designed to convey rights on depositors of presenting banks." *Ibid.*

With respect to petitioner's takings claim, the court of appeals followed the rule set forth by this Court in *National Board of YMCA* v. *United States*, 395 U.S. at 93, which held that the Fifth Amendment requires compensation only when the "government involvement" in the deprivation of private property is "sufficiently direct and substantial." See Pet. App. 12-13. Because Norwest chose to debit petitioner's account on its own initiative, without direction or authority from the United States, the court of appeals concluded that petitioner had not stated a claim for relief under the Takings Clause. See *id.* at 16.

The court of appeals applied the same test to petitioner's due process claim that the government's action constituted an illegal exaction. Pet. App. 17-18. Because no "direct action" by the United States respecting the debiting of petitioner's Norwest account was alleged, the court held that the claim was properly dismissed. *Id.* at 18.

The court of appeals declined to address petitioner's argument that Norwest was petitioner's "agent" and therefore petitioner could itself bring any claims that Norwest might have against the United States. Pet. App. 22-23. After noting its doubts concerning the merit of that argument, the court pointed out that petitioner's complaint contained no mention of a claim

based on agency. *Id.* at 23. The court therefore held that petitioner had "waived any claim it may have against the government based on such a theory." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioner's arguments to the contrary are premised on a misunderstanding of the court of appeals' decision. Accordingly, this Court's review is not warranted.

1. Petitioner contends (Pet. 14-17) that the court of appeals failed to follow this Court's holdings in *Clearfield Trust*, 318 U.S. at 369, and *United States* v. *National Exch. Bank*, 270 U.S. 527, 534-535 (1926), that the United States "is not excepted from the general rule[s]" governing the rights and duties of drawees of commercial paper. Petitioner also argues (Pet. 17, 19-22) that the court of appeals misapplied 31 C.F.R. 240.3(c) because the court did not require Treasury to pay damages to petitioner for Treasury's "failure to decline the Check in a reasonable time." Pet. 17. Petitioner is mistaken in both its arguments, which are premised on a misapprehension of the analysis and the ruling of the court of appeals.

a. First, the court of appeals did not disregard the principle that the United States is subject to the general rules governing commercial paper. The court of appeals discussed *Clearfield Trust* at length and noted the factual similarities between that case and this one. See Pet. App. 6-8. For example, in both cases, checks drawn on the United States Treasury were stolen, endorsed, and cashed, and the United States subsequently took steps to obtain reimbursement. See *Clearfield Trust*, 318 U.S. at 364-365. As the court of appeals ex-

plained (Pet. App. 7), *Clearfield Trust* held that the government, as drawee, was not liable to the presenting bank because the bank had not shown that the government's delay in notifying the bank of the forgery was the cause of the bank's loss. See 318 U.S. at 370. The court of appeals reasoned that, "[a]lthough *Clearfield Trust* was a case in which the United States brought suit against the presenting bank, it is indeed difficult to believe that, where a debit has occurred, making affirmative legal action by the United States unnecessary, *the presenting bank* (here, Norwest) is without legal recourse against the United States." Pet. App. 7-8 (emphasis added). The court of appeals therefore "assume[d] that a claim for an unreasonable delay in notification may properly be brought against the United States" by the presenting bank, just as such a claim could be brought against other drawees.[1] *Id.* at 8.

The court of appeals noted, however, that this case differs from *Clearfield Trust* in a critical respect: here, a depositor (petitioner), rather than a presenting bank (Norwest), seeks to assert rights against the United States. The court found nothing in *Clearfield Trust* to suggest either that the United States could assert direct rights against a depositor, or, conversely, that a depositor could bring a direct claim against the Treasury. Instead, the depositor's claim would lie against its own bank. Pet. App. 8. Thus, the court of appeals did

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[1] There would, of course, have to be a waiver of sovereign immunity for such a claim. Petitioner, without support, erroneously asserts that the United States "acts without sovereign immunity" (Pet. 13) whenever it acts in a commercial capacity. On the contrary, it is only *after* "the United States *waives* its immunity and does business with its citizens, [that] it does so much as a party never cloaked with immunity." *Franconia Assocs.* v. *United States*, 122 S. Ct. 1993, 2001 (2002) (emphasis added).

not disregard the obligations of the United States as an "actor[] in the commercial marketplace." Pet. 16. The court simply concluded that petitioner is not the proper party to bring suit against the United States. Petitioner cites no authority to the contrary.[2]

b. Petitioner's challenge (Pet. 17, 19-22) to the court of appeals' application of the Treasury regulations also lacks merit. The court of appeals correctly stated that a claim for money damages may be asserted against the United States for violation of a regulation only if the regulation is money-mandating as to the plaintiff. Pet. App. 8 (citing *United States* v. *Testan*, 424 U.S. 392, 401-402 (1976)). Moreover, the regulation must confer a right to payment expressly and with specificity. *Id.* at 9; see *Testan*, 424 U.S. at 399-400. Petitioner has not identified any regulation that expressly and specifically gives petitioner a right to money damages.[3]

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[2] Petitioner also contends that the court of appeals "assumed incorrectly that the check here bore a forged endorsement, whereas in fact it was a forged check stolen from the United States that bore a correct endorsement." Pet. 15; see Pet. 12, 19. Whether or not petitioner is correct, the distinction between a forged check and a forged endorsement is of no consequence to the court's ruling on who can bring suit against the United States.

[3] Although the petition contains (Pet. 15-16, 19, 21) numerous references to the Uniform Commercial Code (UCC), petitioner effectively acknowledges (see Pet. 16), as it must, that Treasury's Part 240 regulations—not the UCC—govern the payment of checks drawn on the United States Treasury. See *Clearfield Trust*, 318 U.S. at 366 ("The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."). The petition's references (Pet. 3-4, 18) to proposed amendments to the Treasury regulations are also irrelevant to the questions presented by the petition. The proposed amendments did not address the question decided by the court of appeals—whether the depositor of a check may maintain a dam-

Petitioner argues (Pet. 20) that Treasury's "reasonable time to make such examination" regulation, 31 C.F.R. 240.3(c), "can be fairly interpreted as mandating compensation by the United States for the damages sustained" by petitioner. Alternatively, petitioner argues (Pet. 20, 22) that the government should have followed the reclamation process set forth in 31 C.F.R. 240.6 and 240.7, which, in petitioner's view, is likewise money-mandating. Neither regulation provides petitioner a basis for relief.

As the Court of Federal Claims concluded, the Part 240 regulations are "directed only at protecting the Treasury's rights, rather than those of third parties." Pet. App. 30. The regulations make no mention of providing compensation to anyone for a violation. Indeed, petitioner conceded as much in the trial court. See *ibid.* Section 240.3(c) not only makes no reference to the payment of any money, but, as the Court of Federal Claims noted, it does not "so much as mention depositors, depository institutions or presenting banks." *Ibid.*

The reclamation regulations, 31 C.F.R. 240.6, 240.7, provide for a process under which the government may seek reimbursement after it has failed to reject a check on first examination and the check "has been paid." 31 C.F.R. 240.6(a). That process includes notice and an opportunity for the presenting bank to file a protest. See Pet. App. 11 (discussing regulations). The regulations do not, however, provide anyone a right to compensation if Treasury fails to comply with them.

Moreover, the reclamation regulations were not applicable here. Treasury rejected the check on first examination under 31 C.F.R. 240.3(c) before the check

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ages claim against the government. See 60 Fed. Reg. 48,940 (1995); 62 Fed. Reg. 29,314 (1997).

was "deemed" to have been "paid" under 31 C.F.R. 240.3(d). Therefore, Treasury's efforts to regain the funds were governed by 31 C.F.R. 240.3(c) and 240.9(a)(3)(iv) (2001), rather than the reclamation regulations, which by their terms apply only to a check that "has been paid." 31 C.F.R. 240.6(a).[4]

In any event, the court of appeals did not base its dismissal of petitioner's claim on the conclusion that the Treasury regulations are not money-mandating. Rather, the court held that, even assuming that the regulations *are* money-mandating, they "are not money-mandating *as to [petitioner,]* since there is no indication that they were designed to convey rights on depositors of presenting banks." Pet. App. 11 (emphasis added). Thus, as explained above in the discussion of *Clearfield Trust*, the actual holding of the court of appeals was only that petitioner is the wrong party to

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[4] Petitioner erroneously asserts that "final payment" had been made so that Treasury could seek recovery of the funds in question only by reclamation. Pet. 20; see Pet. 22. Under 31 C.F.R. 240.9(a)(3)(ii) (2001), the FRB must "[g]ive immediate credit" for checks, but that credit is explicitly made "subject to examination and payment" by the Treasury. Section 240.3(c) gives Treasury the right to examine checks and to refuse payment within a reasonable time, and, as noted in the text above, Section 240.3(d) provides that checks are "deemed to be paid" by Treasury "only after first examination has been fully completed." That examination was completed in this case on February 1, 1994, when Treasury advised the FRB that it was refusing payment and directed the FRB to reverse the previous charge to Treasury's account by giving it an "immediate credit therefor," as 31 C.F.R. 240.9(a)(3)(iv) (2001) requires. Thus, under the regulations—and contrary to petitioner's contention—there was no "final payment."

present a claim for money damages based on the government's alleged violation of Treasury's regulations.[5]

Petitioner offers little argument or authority in challenging that holding. Petitioner cites (Pet. 18) *ABN Amro Bank, N.V.* v. *United States*, 34 Fed. Cl. 126 (1995), but the Court of Federal Claims in that case did not address the question whether the Treasury regulations at issue here are money-mandating with respect to a depositor. In any event, as the court of appeals explained (Pet. App. 18 n.1), a decision by the Court of Federal Claims is not binding on the Federal Circuit. Rather, the Federal Circuit's decision binds the Court of Federal Claims. Thus, to the extent *ABN Amro* is inconsistent with the decision of the court of appeals in this case, *ABN Amro* is no longer of continuing validity.

Although petitioner repeatedly states that it "must be viewed as being within the ambit of the protections afforded by the Treasury's Part 240 regulations" (Pet. 19; see Pet. 21), petitioner does not support that *ipse dixit* with any explanation. Similarly, petitioner claims that, "[u]nder this Court's precedents and Part 240, there is no basis for concluding that the Treasury's obligation to provide compensation for a violation of its regulations is limited to a presenting bank," Pet. 21, but petitioner fails to identify any authority supporting its contention.[6]

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[5] The question whether Treasury declined payment within a "reasonable time" was therefore not reached by the court of appeals and is not before this Court.

[6] Petitioner cites the reclamation regulation in support of its argument that "Treasury's obligations * * * are not limited to presenting banks." Pet. 22. As petitioner notes, that provision states that a refund request is sent "to the presenting bank or any other indorser." 31 C.F.R. 240.7(a). However, petitioner concedes

2. Petitioner contends (Pet. 22-24) that this Court's review is warranted because the court of appeals' ruling on its taking claim and its illegal exaction due process claim "continue[s] a split among the circuits on [an] important question of federal law." Pet. 22. Contrary to that contention, the decision of the court of appeals does not conflict with the decision of any other court of appeals.

Relying on *National Board of YMCA* v. *United States*, 395 U.S. 85, 93 (1969), the court of appeals rejected both claims because the loss that petitioner suffered resulted from the debiting of its account by Norwest without any "direct and substantial" involvement of the United States. See Pet. App. 11-18. Petitioner does not challenge the court's reliance on *YMCA* or its analysis. Indeed, petitioner does not even cite *YMCA*.

Instead, petitioner argues that the Court should use this case to resolve a purported conflict among the courts of appeals. See Pet. 23-24 (citing *Alnor Check Cashing* v. *Katz*, 11 F.3d 27 (3d Cir. 1993); *Breault* v. *Heckler*, 763 F.2d 62 (2d Cir. 1985); *Dockstader* v. *Miller*, 719 F.2d 327 (10th Cir. 1983), cert. denied, 467 U.S. 1256 (1984); and *Powderly* v. *Schweiker*, 704 F.2d 1092 (9th Cir. 1983)). This case does not, however, implicate the alleged conflict identified by petitioner. Although the court of appeals found the cases cited by petitioner instructive (see Pet. App. 19-22), none of the cases involves the type of claims at issue here—a takings claim and a claim for money damages based on an alleged illegal exaction in violation of due process. The claim in *Alnor* was based solely on the Treasury regulations, and the claims in *Breault*, *Dockstader* and *Pow-*

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that "Treasury did not avail itself of this procedure, * * * because it was inapplicable." Pet. 20. See pp. 10-11 & n.4, *supra*.

derly were procedural due process claims based on lack of notice and an opportunity to be heard rather than substantive claims for money damages. Thus, even if those cases give rise to a conflict, this case does not present an appropriate vehicle to resolve that conflict.

Petitioner does not contend that the decision here conflicts with *Alnor*, *Dockstader*, or *Powderly*, because the courts in all of those cases rejected the claims asserted against the government. Although the court in *Breault* ruled that the claim in that case could go forward, petitioner's suggestion (Pet. 23) that the ruling here conflicts with *Breault* is wide of the mark. *Breault* involved a claim that recipients of Social Security benefits were entitled to notice and a hearing before the government could require their banks to refund payments that Treasury had erroneously made to the banks as benefits on their behalf. 763 F.2d at 63. The recipients did not claim that they were entitled to damages or to a refund of the benefits; the court acknowledged that the payments that were recouped from the named plaintiffs had indeed been erroneously made. *Id.* at 65. The court held only that the government's role in the debiting of the accounts was sufficient state action to support a procedural due process claim. *Id.* at 63-65. That holding is quite different from the holding of the court of appeals in this case that the government's conduct here was not "direct and substantial" enough to constitute an "illegal exaction" or a taking that gives rise to a claim for money damages against the government. See Pet. App. 17 (explaining that "there is no jurisdiction under the Tucker Act over a Due Process claim unless it constitutes an illegal exaction" and that "[a]n illegal exaction under the Due Process clause exists only if money has been 'improperly exacted or re-

tained' by the government" (quoting *Testan*, 424 U.S. at 401)).

3. Petitioner also errs in contending (Pet. 24-28) that the court of appeals improperly adopted a heightened pleading rule. The court of appeals did not adopt any new pleading rule. Its case-specific ruling that petitioner waived the claim that Norwest was petitioner's agent is correct and does not warrant this Court's review.

The court correctly noted (and petitioner does not dispute) that "[n]o mention of [the agency] theory appears in [petitioner's] complaint." Pet. App. 23. The court of appeals thus correctly held that petitioner had "waived" any such claim. *Ibid.* As petitioner acknowledges, even under the "simplified notice pleading" followed in the federal courts, a complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)). A complaint that makes no mention of any cause of action or claim based on an agency or subrogation theory fails to provide "fair notice" to the defendant and thus fails to satisfy even the most liberal pleading standards.

Even if the complaint could reasonably be construed to encompass petitioner's agency/subrogation theory, petitioner conceded, in response to questioning by the Court of Federal Claims, that it never raised or addressed that claim anywhere in its briefs. C.A. App. 72. The trial court therefore declined to address the issue. See *ibid.* In those circumstances, the court of appeals also properly refused to consider the claim. Cf. *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (Court does not ordinarily decide "questions neither raised nor resolved below").

In sum, the theme that runs through the decision below is that petitioner advanced claims that, to the extent they were valid at all, properly belonged to Norwest, the presenting bank. Petitioner's inability to assert those claims, in turn, largely results from the court of appeals' case-specific holding of waiver. That fact-bound determination does not merit plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DAVID M. COHEN
ANTHONY J. STEINMEYER
MARK A. MELNICK
CHRISTINE N. KOHL
DORIS S. FINNERMAN
Attorneys

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